No. 83-962

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE BEEF INDUSTRY ANTITRUST LITIGATION
M.D.L. DOCKET NO. 248

MEAT PRICE INVESTIGATORS ASSOCIATION, et al.,

Petitioners,

—v.—

SAFEWAY STORES, INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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THE PARTIES

Pursuant to Supreme Court Rule 28.1, the parents, subsidiaries (other than wholly owned subsidiaries) and affiliates of respondents are listed below.*

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* Amterre Limited Partnership; Ardec Group Inc.; Arnold Pharmacies, Inc.; Australia Safeway Limited; Canada Safeway Limited; Cavenham Holdings Inc.; Cavenham (USA) Inc.; Dinner Bell Meats, Inc.; Farmer Jack Pharmacies, Inc.; Generale Occidentale S.A.; George Weston Limited; H Bar K Processors, Inc.; Henpil, Inc.; Holly Enterprises, Inc.; Household International, Inc.; Household Merchandising, Inc.; Kro-Cap; Loblaws Limited; National Holdings, Inc.; Nutrisearch Company; Ornakarn Ltd.; Pantry Pride, Inc.; Shopko Pharmacies, Inc.; Sugar Creek Packing Co.; Wittington Investments, Limited; Wydiv, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals in *In re Beef Industry Antitrust Litigation*, 710 F.2d 216 (5th Cir. 1983).

OPINIONS BELOW

The first opinion of the court of appeals, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) ("*Beef I*"), is reported. The

subsequent opinion of the district court, *In re Beef Industry Antitrust Litigation*, 542 F. Supp. 1122 (N.D. Tex. 1982) ("*Beef II*"), which entered judgment in these cases, is reproduced in the Supplement to the Petition. The second opinion of the court of appeals, *In re Beef Industry Antitrust Litigation*, 710 F.2d 216 (5th Cir.), *reh'g denied*, 716 F.2d 901 (5th Cir. 1983) ("*Beef III*"), which affirmed the judgment in these cases, is reproduced in the Appendix to the Petition.

STATEMENT OF THE CASE

Several hundred cattle feeders (petitioners herein) have sued 21 food retailers, a wholesale grocer, a retailers' trade association, and a beef industry publication (respondents herein). Petitioners fatten cattle and sell them to meat packers. The packers slaughter the cattle and market them as beef and various by-products. The packers sell some of the beef directly to food retailers, such as respondents. The by-products are sold into numerous other concededly competitive markets. Petitioners do not deal with respondents.[1]

Beginning in 1975, petitioners filed a series of lawsuits, consolidated in MDL 248, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Some of these suits (the "packer cases") allege that meat packers conspired to depress the prices they paid petitioners for cattle. The packer cases are pending before the district court. The nineteen suits that are the subject of the Petition (the "retail cases") allege that (i) respondent-retailers conspired to purchase beef from

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1 For the sake of brevity, respondents are not burdening the Court with a detailed counter-statement of the facts. However, the Petition is replete with mischaracterizations of the record, unsupported statements of fact, and internal inconsistencies. For example, the first question presented (Pet. at i) asserts that "the price received by the [feeders] for the live cattle is the same price paid the packers by the retailers for the beef." But the Petition itself demonstrates, and the lower courts found, that the record does not support this assertion. *See* Pet. at 7, 9, 10-11, 23, 25, 26-27. *See also* pp. 5-6, 13, *infra*.

packers at artificially depressed prices; and (ii) the packers acted as mere robots who automatically and without deviation passed the entire alleged depression in beef prices back to petitioners in the form of lower cattle prices.

A. This Court's Decision In *Illinois Brick*

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), this Court held that treble damage claims based on price-fixing allegations by purchasers who did not deal directly with an alleged price-fixer were prohibited as a matter of law.[2] The *Illinois Brick* rule is intended to avoid complexities and uncertainties of proof and the risk of overlapping liability stemming from duplicative treble damage actions by direct and indirect claimants. *See id.* at 730-33. The rule is also intended to limit protracted antitrust litigation and its associated judicial burdens. *Id.* at 737-38, 740, 744-45.

Consistent with this underlying policy, the Court recognized a "narrow" exception for an actual "pre-existing" "fixed quantity" "cost-plus" contract. 431 U.S. at 732 n.12, 735-36. Such an exception was allowed because, under a true cost-plus contract, the laws of supply and demand are suspended, the middleman cannot absorb any part of the overcharge, and the entire overcharge will automatically be passed on to the middleman's customer. The Court allowed actions by indirect purchasers where there is such a contract because (1) the contract itself can be proved without difficulty and (2) the contract terms will establish simply, and without resort to speculative, economic or inferential evidence, the absence of *any* absorption of the overcharge at the middleman level. *See id.*

B. *Beef I*

Following the decision in *Illinois Brick*, the district court granted respondents' motion for judgment on the pleadings. In

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2 This rule made treatment of claims and defenses consistent by completing the analysis in this Court's prior decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

Beef I, presented with only the pleadings, the Fifth Circuit reversed.

Reasoning that there was no basis for distinguishing between indirect sellers and indirect purchasers under *Illinois Brick*, the court of appeals rejected petitioners' argument that *Illinois Brick* did not apply to these cases because petitioners were sellers, not purchasers. 600 F.2d at 1159. However, the court held that, on the pleadings, petitioners came within the "cost-plus" exception to *Illinois Brick* even though there were no actual "cost-plus" contracts between packers and feeders. More particularly, the court of appeals determined that (i) petitioners had alleged that the packer-middlemen were immune from the interactions of supply and demand, and did not absorb any part of the alleged depression in beef prices, because the prices at which packers purchased cattle were invariably predetermined by the packers' rigid application of fixed formulas to Yellow Sheet beef quotations;[3] and (ii) petitioners claimed that these allegations could be proved simply and without resort to the speculative, economic or inferential evidence barred by *Illinois Brick*. *See id.* at 1163-66.

The court remanded with directions that it should "be determined early in the litigation" whether petitioners could *in fact* so establish the "functional equivalent" of "cost-plus" contracts between packers and feeders, and invited respondents "to raise [the 'cost-plus'] issue again by summary judgment motion." *Id.* at 1166.

This Court denied retailers' petition and feeders' cross-petitions for writs of certiorari. 449 U.S. 905 (1980).

C. *Beef II*

After the litigation was remanded in October 1980, the district court provided a full opportunity for discovery on the "cost-plus" issue. On September 15, 1981, after completion of this discovery, respondents moved for summary judgment.

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3 The Yellow Sheet is a price reporting service that petitioners allege reflected the alleged depression in beef prices.

Petitioners then asked for, and received, a six month period in which to prepare their response, and they then engaged in additional discovery. On June 14, 1982, after all briefs and evidentiary materials had been filed, the district court granted respondents' motion, finding that "the hoped-for proof of the feeders' counsel and reality have parted company." *Beef II*, 542 F. Supp. at 1129.

The court first set forth the burden respondents would have to meet on summary judgment:

> "Accepting all of the facts in the feeders' affidavits as true and giving them the benefit of all reasonable inferences, the retailers will have met their burden if they have shown and the feeders have not in a competent manner disputed that the proof of passing-on presents the evidentiary problems that *Hanover Shoe* and *Illinois Brick* sought to avoid." 542 F. Supp. at 1131.

The court then demonstrated that the complexity and uncertainty of petitioners' pass-on proof mandated dismissal of their claims.

The district court found that petitioners' own evidence demonstrated that "[u]nlike a cost-plus contract, a variety of factors influenced the pricing decisions made by packers: individual needs, competition and negotiation for cattle, estimation of yield and grade of cattle, conditions in the cattle markets, and the fluctuation of the by-product market." 542 F. Supp. at 1131. Thus, the court concluded that "it is beyond reasonable factual dispute that the feeders cannot show that the pricing decisions of the packers are '. . . determined in advance without regard to the interactions of supply and demand' . . . ." *Id.* (citation omitted).

In addition, the court found that respondents' "undisputed" empirical data demonstrated that cattle prices did not move in a fixed relation with Yellow Sheet beef quotations. 542 F. Supp. at 1138-39. Taken together with the factors influencing packers' pricing decisions, these data made clear that, viewed most favorably to petitioners, there was no genuine issue that

packers used the Yellow Sheet, at most, as a rough rule of thumb. *Id.* at 1135-39; *see also id.* at 1140-42.[4]

The district court also found that, because of "the existence of separate markets for beef and by-products":

> "It cannot be demonstrated 'whether (or to what extent),' 600 F.2d at 1166, when packers bought cattle, they absorbed the alleged depression in beef prices or rather absorbed a change in by-product prices." 542 F. Supp. at 1139.

For this reason and others, the court concluded that there was no genuine issue with respect to petitioners' inability to prove that packers passed on the entirety of any alleged depression in beef prices. *Id.*

D. *Beef III*

On July 25, 1983, the Fifth Circuit unanimously affirmed. The court determined that petitioners' "summary judgment proof . . . falls far short of their allegations" of functional equivalency, 710 F.2d at 219, and concluded:

> "The defendant-retailers showed that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. The defendants' overwhelming proof demonstrates that other factors beyond the Yellow Sheet quotations influenced the packers' pricing decision." *Id.* (citations omitted).

The *Beef III* panel also rejected petitioners' argument that it should reverse the *Beef I* panel's holding that *Illinois Brick* applies to petitioners' damage claims. *Id.* at 220.

On September 12, 1983, the feeders' petition for rehearing and suggestion for rehearing en banc were denied. 716 F.2d 901.

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4 Petitioners also proffered the U.S. Department of Agriculture's Beef Pricing Report. (See Pet. at 6.) As the district court found, the record evidence concerning this report, including the deposition testimony of its author, further demonstrated that packers used the Yellow Sheet only as rough rule of thumb. *Beef II*, 542 F. Supp. at 1137-38.

REASONS FOR DENYING THE WRIT

Petitioners have cited no "special and important reasons" why this Court should grant a writ of certiorari in these cases. Supreme Court Rule 17. There is no conflict among the Circuits; there has been no departure in these cases from "the accepted and usual course of judicial proceedings;" there has been no decision of "an important question of federal law which has not been, but should be, settled by this Court;" and there has been no decision conflicting with the decisions of this Court. *See id.*

I. THIS COURT'S DECISIONS IN *ILLINOIS BRICK* AND *HANOVER SHOE* RESOLVE ALL ISSUES RAISED BY THE PETITION

At the core of this Court's reasoning in *Illinois Brick* and *Hanover Shoe* was the concern that in the real world, as opposed to the economist's theoretical model, the subtle ways in which market forces affect pricing decisions make it impossible to reconstruct with ease or certainty whether or how a change in the middleman's cost was passed on to its customer or absorbed by the middleman itself. *See Illinois Brick*, 431 U.S. at 725 & n.3, 731-33, 741-43; *Hanover Shoe*, 392 U.S. at 492-93. Thus, the Court observed that efforts to apportion recovery for an alleged injury, absorbed at various tiers in a chain of distribution, add greatly to the complexity, expense and burdens for both courts and litigants, and impair the efficacy of private antitrust enforcement itself. In addition, these apportionment problems create a serious risk of multiple liability. This Court determined that private actions should not be burdened with these apportionment questions. Petitioners would have this Court reintroduce these burdens into antitrust litigation.

A. *Illinois Brick* Applies To Petitioners' Claims

Petitioners contend that the *Illinois Brick* rule should not apply to indirect sellers. But uncertainties and difficulties in

analyzing price and output decisions are equally present whether an indirect plaintiff is a purchaser or a seller. In either case the apportionment of recovery rests on the same theory and calls for the same type of evidence; and in either case it is necessary to prove how prices, sales, costs, and profits would have varied at each level in the distribution chain if the challenged conduct had not occurred. *See Illinois Brick*, 431 U.S. at 725, 731-33, 741-43. Contrary to petitioners' claim (Pet. at 13), a remote seller that is first in the chain of distribution is in the same situation as a remote purchaser such as an ultimate consumer. Neither can "pass-on" the alleged illegal over- or undercharge. No principled distinction can be drawn between a seller and purchaser plaintiff for *Illinois Brick* purposes. The court of appeals therefore held in *Beef I* that:

> "there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. *Illinois Brick* therefore speaks to the instant cases." 600 F.2d at 1159.

Beef I was clearly correct. There is no conflict in the Circuits. Since *Beef I*, not only has the *Beef III* panel agreed, 710 F.2d at 220, but so has the Tenth Circuit. *Zinser v. Continental Grain Co.*, 660 F.2d 754, 760-61 (10th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982).[5]

Petitioners also argue that their seller claims are not pass-on claims because they must sell into a market whose total price level is depressed and, as a result, some cattle feeders whose beef does not reach any of the respondent-retailers may nevertheless be injured by the general reduction in prices caused by

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5 *Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978), does not support petitioners' argument. There, the court held that *Illinois Brick* did not apply where the plaintiff was a *purchaser* who dealt *directly* with a member of a vertical conspiracy. 78 F.R.D. at 443-44. By contrast, here petitioners are sellers who admittedly do not deal directly with respondents.

the alleged violations. The purported difference is irrelevant. Petitioners' "umbrella theory" in no way avoids the need to allocate the over- or undercharge. Since petitioners are indirect claimants, proof of injury must be made for each of them by apportioning the effects of price changes through multiple distribution levels.

Finally, petitioners urge that the rule of *Illinois Brick* and *Hanover Shoe* should be changed to permit indirect plaintiffs to bring suit whenever there may not be strong incentives for the direct plaintiff to sue. This argument was specifically rejected by this Court in *Illinois Brick*. There, the Court acknowledged the possibility that some persons "who may have been actually injured" may not recover and some suits might not be brought at all. 431 U.S. at 746. The Court chose nonetheless to give full sanction to the direct suits and to bar the indirect claims in their entirety. *Id.*

Nothing has happened since the decision of this Court to suggest that the Court was wrong. Petitioners' reliance on *Blue Shield v. McCready*, 457 U.S. 465 (1982), is misplaced. In *McCready*, this Court addressed the issue of "standing" under Section 4 of the Clayton Act. However, *Illinois Brick* made clear, and *McCready* reiterated, that that issue is "analytically distinct" from the "pass-on issue." *Illinois Brick*, 431 U.S. at 728 n.7; *McCready*, 457 U.S. at 476. Moreover, in *McCready*, unlike in these cases, the underlying complexities and difficulties of proof in tracing and apportioning damages were not present. *See* 457 U.S. at 475 n.11.[6]

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6 Petitioners' argument that their claims should be reinstated because the packers are allegedly time-barred from suing respondents makes an indirect claimant's suit dependent upon the passage of the limitations period (contrary to the principle of repose) and upon proof that the direct claimant could have, but did not, file suit. Such a result would require litigants to wait for years to know whether their claims were allowed. Such case-by-case exceptions to the *Illinois Brick* rule should not be countenanced. *See In re Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1342 (9th Cir. 1982), *petition for cert. filed sub nom. California v. Standard Oil Co. of California*, 51 U.S.L.W. 3873 (U.S. May 27, 1983) (No. 82-1938).

The Petition simply seeks to have this Court revisit—without cause—the sound reasoning underlying *Illinois Brick* and *Hanover Shoe*.

B. *Illinois Brick* Bars Petitioners' "On The Average," "Over Time" Pass-On Theory

Petitioners contend that, in the circumstances of these cases, all they must show to escape the *Illinois Brick* bar is that the packers did not absorb any part of the alleged depression in beef prices "on the average," "over time." (See Pet. at 10-11, 23.)

There are no facts in the record that suggest that petitioners could make such a showing. The evidence in the record indisputably demonstrates that petitioners could *never* show that "on the average," "over time" or otherwise packers did not absorb some part of the alleged depression in beef prices. *See Beef II*, 542 F. Supp. at 1139.

In any event, even if petitioners could make such a showing, their argument is wrong as a matter of law. As the Fifth Circuit demonstrated in *Beef I*, and reaffirmed in *Beef III*, the requirements for "cost-plus" functional equivalency that petitioners now seek to avoid were clearly mandated by this Court in *Illinois Brick*. *See Beef I*, 600 F.2d at 1163-66; *Beef III*, 710 F.2d at 220.

Petitioners' "over time," "averaging" argument means that sometimes packers paid above equivalent Yellow Sheet beef quotations, and sometimes below the alleged Yellow Sheet "ceiling." As the courts below demonstrated, and as petitioners do not contest, "[i]f packers averaged out gains and losses, . . . they would absorb some loss on some days." *Beef III*, 710 F.2d at 220, *quoting Beef II*, 542 F. Supp. at 1139 n.19. Accordingly, petitioners' argument (i) runs afoul of this Court's rejection of "cost-based rules of thumb" in *Illinois Brick* (*see Beef III*, 710 F.2d at 220); (ii) is contrary to the *Illinois Brick* holding that, so long as the direct claimant is injured to some extent, it alone has the right of action under

Section 4 of the Clayton Act (431 U.S. at 732 n.12, 745-46); (iii) contravenes the requirement that petitioners show with certainty what actual cattle prices would have been in the absence of the alleged conspiracy (*i.e.*, causation)[7] (*see Illinois Brick*, 431 U.S. at 725, 732-33, 742-43; *Hanover Shoe*, 392 U.S. at 492-93); and (iv) does not avoid tracing and apportionment of damages (*see Illinois Brick*, 431 U.S. at 737-41; *Beef II*, 542 F. Supp. at 1141).

In sum, all petitioners are saying with their "over time," "averaging" argument is that packers behaved just as all businesses without "cost-plus" contracts behave—they acted in the hope that revenues would exceed costs over the long term so that they could remain profitable entities. Thus, the "cost-plus" exception proffered by petitioners would swallow the *Illinois Brick* rule. *See Beef II*, 542 F. Supp. at 1141-42.

C. *Illinois Brick* Bars Petitioners' "Variable Plus" Pass-On Theory

Petitioners also seek to explain away the apportionment problems inherent in their pass-on claims by suggesting that packers priced their cattle purchases "to *attempt* to break even on the carcass" and make their profit and cover their costs from the sale of by-products. (Pet. at 21, emphasis added.) Thus, petitioners claim that the packers' by-product revenues are the "variable 'plus' " in the "cost-plus" equation. (*Id.*) Petitioners then assert that "there is nothing in the case law that requires the plus to be 'rigid' or 'lockstep'." (*Id.*)

As the lower courts properly determined, petitioners are wrong. First, petitioners' contention of a varying markup caused by competition among packers in the by-products markets admits that packers necessarily absorbed losses due to the alleged depression in beef prices. *See Beef II*, 542 F. Supp. at 1139 & n. 19, 1141. Moreover, petitioners' varying markup

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7 Whenever a packer paid below the alleged Yellow Sheet ceiling, petitioners cannot show that the packer would have paid more in the absence of the alleged conspiracy.

theory, which artificially allocates the packers' beef and by-product revenues, was expressly rejected by this Court in *Illinois Brick*:

> "Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. . . . *These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions.* . . . The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants." 431 U.S. at 744 (emphasis added, citations omitted).[8]

Under petitioners' theory, each transaction would have to be scrutinized at trial to reconstruct each sale of beef and by-products and link those sales to each purchase of cattle to try to determine whether packer losses were incurred in the sale of beef, by-products or both. Thus, the difficulties and uncertainties of damage tracing and allocation cannot be avoided in these cases. *See Beef III*, 710 F.2d at 220; *Beef II*, 542 F. Supp. at 1141. Petitioners have provided no reason for this Court to revisit *Illinois Brick*.

II. THIS COURT SHOULD NOT SEARCH THE RECORD TO DETERMINE WHETHER PETITIONERS RAISED A GENUINE ISSUE OF MATERIAL FACT IN CONNECTION WITH RESPONDENTS' SUMMARY JUDGMENT MOTION

The courts below neither weighed evidence nor ignored petitioners' affiants. To the contrary, the courts accepted *petitioners'* version of the facts; it was petitioners' own complex and speculative evidence, and the admissions it contained, that indisputably demonstrated that they could not present "cost-

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8 Petitioners' allocation of beef and by-product revenues is also unsupported by the record and rejected by economic theory. *See Beef I*, 600 F.2d at 1165; *Beef II*, 542 F. Supp. at 1141-42. *See generally* Demsetz, *The Private Production of Public Goods*, 13 J.L. & Econ. 293 (1970); A. Kahn, 1 *The Economics of Regulation* 77-83 (1970).

plus" equivalency proof in the noncomplex manner required by *Illinois Brick* and *Beef I*. *See Beef III*, 710 F.2d at 219-20; *Beef II*, 542 F. Supp. at 1131-39.

Petitioners' summary judgment evidence was replete with admissions that cattle prices resulted from price negotiations between packers and feeders (*Beef II*, 542 F. Supp. at 1133), the demand for cattle (*id.* at 1132, 1134), the supply of cattle (*id.*), each packer's individual needs for cattle (*id.* at 1132), competition among packers for cattle (*id.* at 1132-33), by-products prices (*id.* at 1134, 1138), packer judgments about future price trends in the beef and by-products markets (*id.* at 1139), and individual packer's estimates of cattle characteristics (*id.* at 1133). Respondents' affidavits from all major and many smaller packers agreed that cattle prices resulted from these market forces and others. *See id.* at 1131-34. And respondents' unrefuted empirical data conclusively showed that there was no fixed relation between Yellow Sheet beef quotations and cattle prices. *Id.* at 1135-39.

At bottom, Point II of the Petition requests this Court to become the third court to review the summary judgment record. There is no reason for the Court to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

January 13, 1984

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